In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 193

JOHN LLOYD TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2a; R. 122) is reported at 221 F. 2d 809.

JURISDICTION

The judgment of the Court of Appeals (Pet. 1a; R. 121) was rendered on May 3, 1955, and a petition for rehearing was denied on May 31, 1955 (R. 129). The petition for a writ of certiorari was filed on June 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subpoena duces tecum to appear before a grand jury issued by the court clerk under the seal of the court is invalid because not bearing the signature of a judge.

2. Whether the filing of a motion to quash a subpoena duces tecum operated to insulate petitioner against liability for contempt in failing to appear in answer to the subpoena where petitioner went to an inaccessible part of a foreign country before his motion to quash was heard, and remained there for some time beyond the return date of the motion.

3. Whether petitioner was offered a witness fee and mileage as required by Rule 17(d), F. R. Crim. P.

4. Whether petitioner was entitled to a jury trial on a charge of contempt.

5. Whether the judge who presided at the contempt hearing was disqualified to do so because of his remarks at the hearing on the motion to quash the subpoena.

STATUTES AND RULES INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 17, F.R. Crim P. provides in pertinent part:

Subpoena

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be

unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

* * * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

Rule 42(b), F. R. Crim. P. provides in pertinent part:

Criminal Contempt

* * * * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in

subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Michigan of criminal contempt, in violation of 18 U.S.C. 401, for his failure to honor a subpoena duces tecum of a grand jury of that court (R. 107). He was sentenced to five months' imprisonment (R. 112). On appeal the conviction was affirmed *per curiam* (R. 122).

The facts pertinent to the issues raised may be summarized as follows:

The subpoena duces tecum dated August 6, 1953, addressed to petitioner as President of Professional Screen Guild, Inc., of Los Angeles, California, ordered him to appear on August 13, 1953 at 10 o'clock to testify before the grand jury and to bring all records and books covering operation of the Detroit, Michigan office of the Guild, plus membership records of six named individuals (R. 2, 3). A United States marshal served petitioner with this subpoena on August 11th at Los Angeles (R. 51, 53). Petitioner acknowledged that he had charge of the records requested (R. 53). At his request the postal inspector, who had accompanied the marshal to identify petitioner, telephoned Detroit and received authorization to extend the date of the subpoena to August 18th, at which date petitioner said he would be ready to appear with the records (R. 15, 16, 53, 54). He was told that advance payment of his travel expenses and fees would be paid him at the marshal's office in Los Angeles and he stated that he would come by and pick up the money (R. 16, 54).

Eight minutes before he was due to report to the grand jury, petitioner by counsel filed in the district court a motion to quash the subpoena (R. 4). The motion stated that the subpoena was unreasonable and oppressive in giving him only "two" days for compliance (R. 5); that petitioner had been refused advance payment of fees

and mileage (R. 4); and that his life would be endangered if he came to Detroit (R. 5). An attached affidavit signed by petitioner stated that the subpoena was a fishing expedition, that it did not inform him who was being investigated by the grand jury and did not say whether he himself was under investigation (R. 7, 8). Petitioner averred that he feared for his life if he came to Detroit; that when last in Detroit, he was constantly followed by thugs who he was informed and believed were in the employ of the Better Business Bureau of that city; that his friends had informed him that a threat had been made upon his life "when he appears before the Grand Jury on a subpoena now being prepared" (R. 9). He alleged that "the United States authorities * * * are unwittingly permitting themselves to be used as agents and servants of the Detroit Better Business Bureau in a plot to blackmail the Professional Screen Guild, Inc., and force it to pay an exorbitant membership fee in the Better Business Bureau of Detroit" (R. 10). At the hearing on the motion to quash, the trial court found that the motion and affidavit were insulting, contemptuous and scandalous (R. 28), that it was a studied attempt to influence the conduct of the grand jury (R. 29), that petitioner, "knowing that this case of this Professional Screen Guild has been given some publicity in Detroit, * * * was apparently hoping * * * that the contents of the affidavit would be published in the newspapers, and that the members of the grand jury would read it and,

after reading * * * the alleged charges he makes here, that their conduct and judgment would be influenced" (R. 31).

The court denied the motion stating (R. 35):

> I will deny your Motion to Quash. And, if the Government sees fit to present an Order asking for compliance, or if the Government and the grand jury sees fit to make a Presentment to the Court asking that the Witness, * * * be cited for contempt of court for not complying with the provisions of the *subpoena duces tecum,* I will entertain such a Presentment; and if a Presentment of that description is made, then I will order the arrest of the defendant and ask that he be brought here in the custody of the United States Marshal and a hearing set on why he shouldn't be cited for contempt of court.
>
> So, whatever method of the government wants to pursue is agreeable with the court; the order of compliance or a Presentment from the grand jury, if the grand jury sees fit to make the Presentment; because I am convinced Mr. John Lloyd Taylor is going to try and conduct this matter in his own way and I don't think he should be permitted to do it.

On August 25th, the day following the hearing on the motion, the government filed its petition for rule to show cause why petitioner, Taylor, should not be punished for contempt (R. 19).

At the contempt hearing, petitioner testified that

on August 22, 1953, two days before the hearing on the motion to quash (R. 26), he went on a fishing trip to Mexico (R. 68, 72), to a place where there was no mailing address, no telephone, and which was so remote that his wife did not know where he was (R. 88). He said that she had driven him down there, spent a short time with him in a nearby small city and then gone back, with instructions from him to pick him up again after Labor Day (R. 88, 89). It was on that day, he said, that he first learned of the decision on the motion, at which time he learned also that there was a warrant outstanding for his arrest on a charge of criminal contempt (R. 68). He said that he left Los Angeles on Labor Day and arrived in Detroit six days later to surrender on the warrant (R. 70), having stopped in Chicago and South Bend en route (R. 92).

At the conclusion of the hearing, the court found that the subpoena had been legally served on petitioner; that an adjournment of his appearance before the grand jury was authorized by the United States Attorney's office at petitioner's request (R. 104); that petitioner informed the post office inspector and the United States marshal that he would honor the subpoena and would call at the marshal's office to receive money for his expenses as a witness; that he never appeared and had no intention of appearing (R. 105). The court further found that the motion to quash was not filed in good faith, but was a device to assist petitioner in disobeying the lawful process of the court, that

the affidavit in support of petitioner's motion was contumacious and was submitted in an effort to influence the conduct of the grand jury in relation to an investigation at that time underway (R. 106). The court also found that petitioner concealed himself in a foreign country, Mexico, prior to the time of the hearing on the motion to quash the subpoena, and remained concealed until September 7, 1953; that the act of concealment was a further act on his part to avoid appearing in Detroit as a grand jury witness (R. 106).

ARGUMENT

1. There is no substance in petitioner's contentions (Pet. 21-28) that the subpoena was invalid because it was issued on behalf of a grand jury and did not bear the signature of a judge of the district court. The grand jury is an arm of the district court. Rule 17(a) requires that the subpoena shall be issued by the clerk under the seal of the court, as was done here, and subdivision (g) provides that failure without excuse to obey the subpoena is a contempt of the court which issued it.[1] A similar contention was expressly overruled in *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E. D. Tenn.). As noted in that opinion the contention

[1] The rule is itself adequate notice that disobedience to a subpoena is punishable as a contempt (see Pet. 29). There is no requirement that federal subpoenas, issued in conformity with the federal rules, conform to state procedure (see Pet. 34-36). While an unreasonable subpoena may amount to an illegal search and seizure, that is an issue to be determined on a motion to quash. The mere issuance of the subpoena is not a search.

was overruled by implication in *Wilson* v. *United States,* 221 U.S. 361, 370, 376, where the president of a company responding to a subpoena duces tecum refused to allow the grand jury to inspect the documents which he had brought with him, and on being charged with contempt, challenged the sufficiency of the subpoena because not issued pursuant to an order of court. The Court, after reviewing the several objections to the sufficiency of the subpoena but without again referring to this specific objection, said that "no ground appears upon which the corporation could have resisted the writ;" and again, "* * * that the subpoena was valid and * * * imposed upon the corporation the duty of obedience."

2. Petitioner contends (Pet. 30-33) that the filing of his motion to quash operated automatically to stay his obligation of reporting to the grand jury on the 18th, and that he was under no obligation to do so until a new date was set and an order entered for him to appear and testify. Even conceding that the motion would stay the obligation of reporting until it was heard, the fact remains that before the return date on the motion petitioner deliberately left the country and placed himself in a position where the decision of the court on the motion and its orders or legal process could not reach him until a considerable time after the ruling. Manifestly, petitioner could not undertake for himself to decide when the subpoena

should be made returnable if his motion should be overruled.

3. Petitioner's contention (Pet. 33) that a physical tender of the mileage money and attendance fee had to be made at the time of service of the subpoena is without merit. There was ample testimony that he agreed to come to the marshal's office and collect the money. Inspector French so stated in his affidavit (R. 16, 17); Richard Ransdell, the marshal who served the subpoena, so testified in person (R. 54) and by affidavit (R. 22). Another marshal stated in an affidavit that he called Taylor to advise that his money was waiting for him and it was arranged that Taylor would pick it up on the 12th; that Taylor then called back and said that he would pick up the money on the 13th instead, since a postponement of his appearance to the 18th had been granted (R. 23).

Certainly, if the rule were construed to require a physical tender at the time of service of the subpoena, petitioner effectively waived the requirement.

4. Petitioner had no right to a trial by jury. He was charged, under 18 U.S.C. 401, with contempt by disobedience or resistance to the district court's lawful writ of process. Rule 42(b), F. R. Crim. P., provides for disposition upon notice and hearing, and he received both. It also provides that the defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The sentence refers to 18 U.S.C. 402 and 18 U.S.C.

3691,[2] which provide for trial by jury in certain cases wherein the contempt consists of an act constituting a separate criminal offense under statutes of the United States. Both sections specifically exclude from the provision for jury trial contempts, such as petitioner's, "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought * * * in the name of * * * the United States."

The rule and statutory provisions are of course in harmony with the traditional method of trial of contempt cases without juries. *Ex parte Terry,* 128 U.S. 289. Moreover, petitioner made no demand for a jury and should be deemed to have waived the privilege, even if he were otherwise entitled to it.[3]

5. The trial court's statement, at the conclusion of the hearing on the motion to quash, that an order for compliance with the subpoena would be granted, or that a presentment for contempt would be entertained, furnishes no valid basis for petitioner's claim of bias or "interest." It was a permissible comment, in accord with his holding that petitioner's affidavit was contemptuous and insulting. Reflecting only the court's holding, it comes within the rule that the bias or prejudice which

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[2] See Notes of Advisory Committee on Rules, following Rule 42(b).

[3] 18 U.S.C. 3691 which petitioner erroneously contends applies to him provides that the accused can have a jury "upon demand therefor."

can be urged against a judge must be based upon something other than rulings in the case. *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440, 444, 445 (C.A. 6), certiorari denied, 316 U.S. 671. See *Berger* v. *United States*, 255 U.S. 22, 31; *Ex parte American Steel Barrel Co.*, 230 U.S. 35. The finding of contempt is based on ample evidence of petitioner's deliberate failure to obey the subpoena.

CONCLUSION

The substantial issues, which are factual, were decided correctly by the court below, and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

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JOHN LLOYD TAYLOR,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR REHEARING

MORRIS LAVINE
215 W. 7th Street
Los Angeles 14, California
Attorney for Defendant-Appellant.

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